

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON JASON FLAKES,

Defendant-Appellant.

UNPUBLISHED
December 1, 2011

No. 298679
Kent Circuit Court
LC No. 09-009629-FC

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court, applying a third-offense habitual offender enhancement under MCL 769.11, sentenced defendant to life imprisonment for the murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first contends that the trial court erroneously admitted Johnnie Griggs's testimony that he and defendant were selling drugs before the victim was killed. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). We apply a de novo standard of review when we review preliminary questions of law regarding the admission of evidence. *Lukity*, 460 Mich at 488.

Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1); see also *People v Biggs*, 202 Mich App 450, 452; 509 NW2d 803 (1993). One exception to MRE 404(b)(1) is the "res gestae exception." *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). "Normally the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae." *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). Evidence of a defendant's other criminal acts that are blended with or connected to the crime for which the defendant is charged is generally admissible to explain the circumstances of the crime charged so that the jury can hear the "complete story." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978); see also *Robinson*, 128 Mich App at 340.

Here, Johnnie's testimony concerned the facts and circumstances surrounding the commission of the crime for which defendant was charged and, thus, it was properly admissible as part of the *res gestae*. *Shannon*, 88 Mich App at 146. Specifically, Johnnie's testimony illustrated that defendant was selling drugs when the victim and defendant approached each other. "[T]he acts, conduct and demeanor of a person charged with [a] crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as part of the *res gestae*." *People v Castillo*, 82 Mich App 476, 479; 266 NW2d 460 (1978) (internal citation and quotation marks omitted; emphasis removed). Although Johnnie's testimony provided evidence that defendant was performing "other criminal acts," the testimony explained the circumstances surrounding the victim's death and provided the jury with the "complete story." *Delgado*, 404 Mich at 83. Accordingly, the trial court's decision to admit Johnnie's testimony fell within the range of reasonable and principled outcomes. *Feezel*, 486 Mich at 192.

Defendant also contends that the trial court erroneously admitted Jamal Glenn's testimony that defendant had been incarcerated. We agree that this testimony did not fall under the *res gestae* exception to MRE 404(b)(1). However, the testimony nevertheless was not prohibited under MRE 404(b)(1). It did not refer to any specific "crimes, wrongs, or acts" committed by defendant, *id.*, and the prosecution did not offer the testimony to show defendant's character or propensity to commit the charged crime, *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). Instead, Glenn's testimony was offered to establish, and was relevant to show, the context and setting surrounding defendant's statements to Glenn. In addition, defendant's attorney used the incarceration setting to attempt to show that Glenn provided information against defendant in an attempt to shorten Glenn's own incarceration. Viewing the evidence in the context of MRE 404(b)(1), we find that it adequately met the criteria for admission as set forth in *Knox*, 469 Mich at 509.

Moreover, even assuming, for purposes of argument, that the challenged testimony was inadmissible, we would find no basis for reversal. Indeed, before Glenn testified at trial, other witnesses testified that defendant had been incarcerated in the Kent County Jail. Therefore, even if the trial court had excluded Glenn's testimony about defendant's incarceration, the jury still would have been aware of it.

Defendant's final argument is that the trial court erroneously admitted Gary Griggs's grand jury testimony that defendant was learning how to "hustle." We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). At the outset, we note that the record does not unequivocally establish that the prosecution read into evidence Gary's grand jury testimony that defendant was learning how to "hustle." However, even assuming that this testimony was admitted at trial, defendant has not demonstrated an error affecting the outcome of his trial. *Id.* Defendant asserts that the implication arising from Gary's testimony was that defendant was a drug dealer. It is unlikely, though, that the jury concluded that defendant was a drug dealer based on defendant's learning how to "hustle"; thus, the prejudice from Gary's grand jury testimony, if any, was minimal. Moreover, the prejudice from Gary's testimony was diminished by Johnnie's admissible testimony that he and defendant were selling drugs when defendant and the victim approached each other. Even if the trial court had excluded Gary's "hustle" testimony, the jury still would have been aware of defendant's drug dealing. In addition, the evidence of defendant's guilt was strong. We find no basis for reversal.

Affirmed.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Jane M. Beckering